

FOREWORD

Many questions have been asked concerning the nature and extent of the Attorney General's responsibility to provide legal opinions. The following analysis was prepared to answer many of these questions.

A. THE STATUTES

(1) Article V, section 13, of the California Constitution designates the Attorney General as "the chief law officer of the State." The specific responsibility to provide legal opinions is set forth in Government Code section 12519 as follows:

"The Attorney General shall give his opinion in writing to the Legislature or either house thereof, and to the Governor, the Secretary of State, Controller, Treasurer, State Lands Commission, Superintendent of Public Instruction, any state agency prohibited by law from employing legal counsel other than the Attorney General, and any district attorney when required, upon any question of law relating to their respective offices.

"The Attorney General shall give his opinion in writing to a city prosecuting attorney when required, upon any question of law relating to criminal matters."

(2) Responsibility to provide legal opinions is imposed on other public lawyers by other statutes. (See Gov. Code, §§ 26520 [district attorney], 26529, 27642, 27643, 27647 [county counsel] and 41801 [city attorney].) A review of these statutes makes it clear that the Legislature has apportioned the responsibility for providing legal opinions to public officials among public lawyers at both the state and local levels of government.

(3) The language of section 12519, quoted above, limits the Attorney General's responsibility to provide legal opinions in two respects. First, opinions are provided only to the public officials designated in the statute. Second, only questions of law relating to the office of the requester require an opinion response. The express direction to provide opinions under these limited circumstances implies an absence of any duty to provide legal opinions under other circumstances.

B. THE RECIPIENTS

(1) *Constitutional Officers.* Attorney General's opinions are provided each of the state's constitutional officers. Though the Lieutenant Governor is not named specifically in section 12519, that office is considered a state agency authorized to request opinions under that section.

(2) *Legislators.* Section 12519 states that opinions shall be provided to "the Legislature or either house thereof." This language has long been interpreted to

include individual
or their consultants.

(3) *State Agencies.* Section 12519 states that opinions shall be provided to "any state agency prohibited by law from employing legal counsel other than the Attorney General." Many state agencies have been authorized to employ staff attorneys. Government Code section 11157 provides that the Attorney General "is the legal advisor of each department [of state government] in all matters relating to the department and to the powers and duties of its officers." Because the Attorney General is the state's chief law officer, the office has traditionally provided legal opinions to all state departments, agencies, boards and commissions, including those with staff counsel. However, requests for opinions from those having full time staff counsel must be accompanied by the legal analysis and conclusions of staff counsel. (See C(10).)

(4) *Judges.* Section 12519 does not indicate whether courts are state agencies authorized to request opinions. This ambiguity was resolved by Government Code section 27647 which authorizes the county counsel to represent the judges of the superior, municipal and justice courts in the county "in all matters and questions of law pertaining to any of such judge's duties." This evidences the Legislature's intent that advising trial judges is the responsibility of local public counsel. The Supreme Court and Court of Appeals are state agencies authorized to request opinions under section 12519. Such requests should come from the court at the request of the chief justice or a presiding justice or, as is usually the case, be submitted by the Administrative Office of the Courts.

(5) *District Attorneys and County Counsels.* Section 12519 states that opinions shall be provided to "any district attorney." Government Code section 26520 et seq. provide that district attorneys have civil law duties as well as their duties as public prosecutors. Government Code sections 27640 and 27642 provide that a county board of supervisors may split the duties of the district attorney by appointing a county counsel who thereafter performs all the duties of the district attorney except those of public prosecutor. The Attorney General's responsibility to provide legal opinions to district attorneys has long been interpreted to include county counsels so that all counties will have access to Attorney General's opinions with respect to the laws relating to the civil as well as the prosecutorial functions of the district attorney.

(6) *City Prosecutors.* Section 12519 states that opinions shall be provided to "a city prosecuting attorney when required, upon any question of law relating to criminal matters." This provision is limited to those city offices which actually prosecute misdemeanor cases arising in the city. It does not authorize opinions for city attorneys who do not prosecute criminal cases nor for city prosecutors on civil law questions.

(7) *Requests on Behalf of Others.* Section 12519 states that an opinion shall be given designated officers "upon any question of law relating to their respective offices." (Emphasis added.) This does not authorize a designated officer to request an opinion on a question posed by someone else. When it is apparent that a

request is made on behalf of someone not authorized to request it by section 12519 the request will be declined.

(8) *Deputy or Assistant*. An opinion request should be signed by the principal officer or head of the agency authorized to make the request. If the request is made by a deputy or assistant, inquiry will be made to verify that it was authorized by the principal and the opinion will issue to the principal officer, not to the deputy or assistant.

(9) *Board or Commission*. An opinion request from a board or commission must indicate that the request has been authorized by a majority vote of the board or commission. Opinion requests from individual members of a board or commission will be declined.

C. THE QUESTION

The Attorney General's responsibility under section 12519 is to provide an opinion in writing to designated public officials "when required, upon any question of law relating to their respective offices."

(1) *Written Request*. The words "when required" in section 12519 imply that a formal request must be made by someone authorized to request an opinion before a duty to provide the opinion arises. Such requests must be reduced to writing to avoid misunderstandings regarding the question presented.

(2) *Confidential Advice*. All formal opinions issued by the Attorney General are open to public inspection under the Public Records Act and most are published. If a public official seeks a confidential opinion from the Attorney General the request will be referred to the appropriate legal division for assignment to a deputy who will provide the opinion orally or by confidential letter of advice.

(3) *Relation to the Office*. The question must relate in some manner to the office of the person requesting the opinion. Usually this is apparent from the nature of the question and the office of the requester. When the relation is not clear, inquiry will be made to establish what it is. Occasionally the request transmits a question posed by someone else. In such cases the request will be declined unless it is ascertained that the requester has an official interest in the question other than to accommodate the person who first posed the question.

(4) *Question of Law*. Section 12519 states that opinions shall be provided on "questions of law" not on other kinds of questions. Thus requests for opinions to resolve factual disputes or to resolve conflicting inferences which may arise from certain facts will be declined.

(5) *Specific Questions*. Not every "legal" question is capable of being answered by an opinion, that is by a conclusion based on precise legal analysis. Thus, "What is a crime?" calls for an encyclopedic review of the criminal law rather than an opinion. The courts do not ordinarily provide advisory opinions and require an actual case or controversy between specific parties before addressing legal questions and further limit the scope of legal issues by elaborate pleading and conference procedures. Section 12519 does not require an actual controversy but it does

require that the officers requesting opinions limit their requests to those actual or potential legal problems which confront them in the performance of their official duties. The Attorney General has long followed the practice of reframing the questions presented when this appeared necessary or desirable. This is done, not only to assure a response that will properly address the legal problem confronted by the requester, but also to sufficiently define the circumstances so that an opinion response based on precise legal analysis may be made. To that end the requester will often be contacted for more particulars of the problem. However, the Attorney General's office will not conduct surveys or make investigations to ascertain the facts needed to properly frame a question for legal analysis.

(6) *Conflict of Interest.* The Attorney General, like every other lawyer, may find there is a conflict of interest with respect to a particular legal question by reason of other legal matters the office is involved in, by prior legal business, personal business interest and the like. Of course, such a conflict would require the Attorney General to decline the request for such an opinion.

(7) *Interpreting Local Laws.* Occasionally an opinion is sought to interpret local charter provisions, ordinances, resolutions, regulations or rules. Since such measures have no application outside the local jurisdiction there is no need to review local counsel's interpretations to encourage statewide uniformity of interpretation, the principal purpose of providing Attorney General's opinions to local counsel. Further, since the principal responsibility for interpreting and enforcing local measures rests with local counsel, opinions which might conflict with the views of local counsel would hinder rather than aid the enforcement of such local laws. For these reasons the Attorney General declines opinion requests calling for the interpretation of local charters, ordinances, resolutions, regulations or rules.

(8) *Interpreting Pending Legislation.* Sometimes an opinion request concerns proposed legislation or constitutional amendments. Providing opinions on pending bills would involve the Attorney General in the bill drafting process, a function the law specifically assigns to the Legislative Counsel Bureau. Providing opinions on proposed constitutional amendments might inappropriately interfere with the election process. For these reasons the Attorney General's office has traditionally declined opinion requests regarding the validity or interpretation of proposed legislation or constitutional amendments prior to their enactment.

(9) *Pending Litigation.* Occasionally the legal question presented in an opinion request is an issue in litigation pending before the courts or in some administrative proceeding. The Attorney General's office has traditionally declined to provide opinions on such questions while the litigation is pending. There are two basic reasons for this practice. First, resolution of the litigation will often provide the answer to the question. More significantly, the issuance of an Attorney General's opinion while litigation is pending on the issue might be considered as an attempt to interfere with or influence the litigation. Of course there is no way the Attorney General's office can be aware of all issues in every case being litigated so the practice is not foolproof. Nevertheless, when the office is aware of the litigation initially, an opinion request on the issues raised therein will be declined and when made aware of such litigation later, opinion preparations will be terminated.

After litigation on the issue has terminated, the Attorney General's office will normally respond to any legal questions which remain.

(10) *Requester's Opinion.* If the law requires a public officer to be a lawyer or the office is provided with full time staff counsel, that lawyer has the primary responsibility for resolving the legal issues which relate to that office. The legislative authorization for such an officer to request an opinion from the Attorney General was intended as a means of reviewing the exercise of that primary responsibility at the officer's request, not as a replacement for it. This is the rationale which underlies the long standing practice that an opinion request from an officer who must be an attorney or who has full time staff counsel will be declined unless it is accompanied by the legal conclusions, supported by a full legal analysis, prepared by such counsel.

John K. Van de Kamp
Attorney General of the State of California